UNITED STATES OF AMERICA
DISTRICT OF MAINE

MAINE PEOPLE'S ALLIANCE and NATURAL RESOURCES DEFENSE COUNCIL, INC.,	)	
Plaintiffs	)	
v.	)	Civil No. 00-69-B-C
HOLTRACHEM MANUFACTURING COMPANY L.L.C. and MALLINCKRODT INC.,	)	
Defendants	)	

RECOMMENDED DECISION

This matter is before the court on two motions filed by defendant Mallinckrodt, Inc.: (1) a motion for an order in its favor on its defenses relating to causation (Docket No. 48); and, (2) a motion for judgment in its favor asserting that the doctrine of primary jurisdiction bars plaintiffs' claims (Docket No. 49).[1] Mallinckrodt submitted one statement of undisputed material facts containing ninety separate paragraphs in support of all these motions (Docket No. 52). The plaintiffs responded to each paragraph and submitted an additional statement of material facts consisting of seventy-two separate paragraphs (Docket No. 56). Mallinckrodt replied. (Docket No. 66.) I now recommend that the court **DENY** both motions.

[1] Along with these two motions Mallinckrodt has filed a motion for summary judgment asserting that the plaintiffs suit is barred by the equitable doctrine of laches. I address this motion is a separate order issued on this same date.

Overview of Dispute

The Maine People's Alliance (MPA) and the Natural Resources Defense Council, Inc. (NRDC) have brought this citizen suit under 42 U.S.C. § 6972(a)(1)(B) of the Resource Conservation and Recovery Act (RCRA). This section allows any person to commence an action:

> against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment

42 U.S.C. § 6972(a)(1)(B).

The moving defendant Mallinckrodt Inc. formally owned and operated a chemical manufacturing facility in Orrington, Maine. The plaintiffs assert that mercury-containing water discharge and air emissions from this facility have contaminated the Penobscot River, creating an imminent and substantial endangerment to the health and environment. They seek injunctive relief, in the form of an order requiring that the defendants undertake a scientific study of mercury contamination in the Penobscot River and develop and implement a remediation plan.

Mallinckrodt is involved in an ongoing regulatory process with the Environmental Protection Agency (EPA) and the Maine Department of Environmental Protection (MDEP) that is addressing mercury contamination stemming from the Orrington plant. Though it is anticipated that this process will generate a remediation plan, to date there has been no finalized "media protection standards" generated from this undertaking.

Discussion

Because two of these three motions are not submitted squarely as motions for summary judgment a brief foray into the order generating these motions helps frame their disposition. A July 17, 2001, procedural order by this Court included the following paragraph:

> The Court **FURTHER NOTES** the assertion of numerous affirmative defenses by the Defendant, some of which would appear to be dispositive of the action if successfully pursued. It is hereby **FURTHER ORDERED** that all such affirmative defenses, the resolution of which may result in full disposition of this case, be brought forward by written motion as a dispositive motion under Local Rule 7 and, pursuant to the requirements thereof, be filed and supported on or before August 6, 2001, as required by the Report of Telephone Conference and [Scheduling] Order.

(Docket No. 43.)

In response to this order Mallinckrodt has filed these motions in the hopes of, it seems, preserving its Second, Seventh, and Eleventh Affirmative Defenses. In its motion for an order in its favor on its Second and Eighth Separate Defenses, relating to causation, Mallinckrodt affixes this footnote after its opening sentence:

> Mallinckrodt interprets the Court's Procedural Order as requiring motions to be filed on any of its Separate Defenses which, if successful, would be dispositive of the case. Mallinckrodt has not interpreted the Order as requiring that these motions be asserted as motion for summary judgment. If Mallinckrodt misinterpreted the Order in this regard, Mallinckrodt respectfully requests that the Court review its motion as if it were a motion for summary judgment or, in the alternative, permit it leave to amend the motion accordingly.

(Mot. for Order on 2d & 3d Defenses at 1 n.1.) In the prayer for relief it "respectfully requests that, after trial," this court grant the summary judgment motion. (Id. at 15.) The plaintiffs take this footnote as an implicit concession that Mallinckrodt is not entitled to summary judgment regarding causation. (Pls.' Opp'n to Dispositive Mots. at 14 n.5.)

With respect to its motion for judgment in its favor on its Eleventh Separate Defense premised on the doctrine of primary jurisdiction, Mallinckrodt tags the following footnote onto its first sentence:

> The July 17 order required Mallinckrodt to make a motion by the dispositive motion deadline on any defense that, if established, would dispose of the case. Mallinckrodt interprets this order as requiring it to file such a motion, even if Mallinckrodt expects to establish the defense at trial; however, Mallinckrodt does not interpret the order to require a summary judgment motion as to such defenses. In the event the Court interprets its order to require a summary judgment motion, Mallinckrodt requests this motion be treated as a summary judgment motion.

(Mot. for Order on 11th Defense at 1 n.1.)

I. Mallinckrodt's Motion for Judgment in its Favor on the Issue of Causation

It is manifest that this defense is not ripe for summary judgment. The causation/substantial endangerment inquiry is replete with disputed facts involving competing studies and dueling expert witnesses. Mallinckrodt seems to acknowledge that this is an issue to be resolved at trial; this recognition is reflected in the first footnote, its prayer for relief, and references in its motion to what the trial will show and its anticipation that it will be entitled to judgment on the bases of these defenses. (Mot. for Order on 2d & 3d Defenses at 1 n.1, 3, 6-7, 15; see also Def.'s Reply at 11.) Though this pleading will help set the stage for the bench trial, I recommend that the Court deny it in so far as it is a motion for a pre-trial disposition.

II. Mallinckrodt's Motion for Judgment in its Favor on the Ground that the Doctrine of Primary Jurisdiction Bars Plaintiffs' Claims

While this motion is not gilded as a motion for summary judgment and Mallinckrodt does not insist that it should be (Mot. for Order on 11th Defense at 1 n.1), Mallinckrodt does seem to welcome, if not seek once again, a summary disposition based on the current state of the record. This motion I will address at greater length than the one dealing with causation because this is a defense that can theoretically ripen in between the time to file motions to dismiss and trial. Though I have reviewed the dueling statements of material facts, I do not treat this as a motion for summary judgment in a formal sense. I have found that facts framed in the motion and the response are adequate to address the legal questions raised and that this dispute does not turn on the material facts but on what those facts mean for the application of the primary jurisdiction doctrine.

Both parties acknowledge that this motion for a disposition on the basis of primary jurisdiction must be read with a view to my recommended and affirmed decision on the motion to dismiss filed by both defendants, Mallinkrodt and HoltraChem Manufacturing Company, L.L.C. See Maine People's Alliance v. HoltraChem Mfg. Co., Civ. No. 00-69-B (D. Me. Nov. 1, 2000) (Kravchuk, Mag. J.). That motion challenged the plaintiffs' standing and asserted that the doctrine of primary jurisdiction should be applied in deference to the regulatory proceedings involving the EPA and the MDEP.

In that opinion I concluded that the doctrine of primary jurisdiction did not bar plaintiffs' suit. Therein I described the contours of the doctrine that permits a court to defer or stay a court action while an administrative agency with competence in the area is considering the issues that arise in the suit. Id. at 11. The doctrine is animated by a hope that it coordinates administrative and judicial resources and utilizes agency expertise. Id.

In that decision I fleshed out this inquiry by discussing the relevant cases, including the principle cases advanced by the defendants: Friends of Santa Fe County v. LAC Minerals, Inc., 892 F. Supp. 1333 (D.N.M. 1995) and Davies v. National Co-op Refinery Ass'n, 963 F. Supp. 990 (D. Kan. 1997). I determined that while the state of First Circuit law suggested that the doctrine could be applied in the context of a RCRA citizen suit, it was not appropriate to apply it with respect to this suit given the (not atypical) fact pattern presented. Id. at 17. I concluded:

> That this citizen suit is not atypical in the way both Friends and Davies are is clear to me and I conclude that the primary jurisdiction doctrine is inapposite here. First, considering the factual background of Friends, the Plaintiffs have not played an instrumental role in fashioning any aspect of the existing EPA proceedings under the Consent Decree so as to become inextricably entangled in the administrative process. Second, considering the tensions within Davies, the Plaintiffs do not seek injunctive relief that undermines, conflicts with or is otherwise incompatible with any down-river remedial plan orchestrated by the EPA because no down-river remedial plan is underway or envisioned. In my view, this citizen suit is precisely the sort of citizen suit contemplated by Congress, one in which citizens are seeking to enforce environmental laws in circumstances that the relevant administrative agencies have overlooked or are otherwise failing to "diligently prosecute." 42 U.S.C. §§ 6972(b)(1)(B) & (C).
>
> However, even if the conventional primary jurisdiction test were applied to this RCRA citizen suit, it would not warrant deferral of the down-river remediation issue to the EPA. With respect to the down-river effects of mercury contamination, it must be noted that since instituting a legal suit in 1991 all the EPA has done is write a letter to HoltraChem, on the eve of this suit, requesting that it commission a study to investigate the down-river impacts of mercury contamination. This letter has no binding force on HoltraChem because it exceeds the scope of the Consent Decree, which governs only the plant site and discharge points. Thus, it cannot be said that the EPA is currently conducting any "proceeding" with respect to down-river contamination, despite defendants' brief's representations to the contrary. A showing of the existence of some proceeding with "teeth" is certainly not too much to ask of a party moving to dismiss a congressionally authorized citizen suit pursuant to a prudential judicial doctrine. A mere letter does not an administrative proceeding make. Because the Defendants cannot demonstrate the existence of a valid and binding EPA proceeding bearing on the issue presented in this case, let alone the existence of a direct conflict between an agency proceeding and the injunctive relief Plaintiffs seek, there is no principled basis for the court to defer the exercise of its jurisdiction under the auspices of the doctrine of primary jurisdiction.

Id. at 17-19 (footnotes omitted). In a footnote I observed: "In all likelihood, postponing this suit for the EPA to administer the down-river contamination issue would unduly delay any eventual remediation effort precisely because there is no enforcement mechanism currently in place." Id. at 18 n.13.

How has the predicate for such a disposition changed since my November 2000 order in Mallinckrodt's view? In response to the EPA and MDEP notice of disapproval and comments of April 2000 Mallinckrodt has undertaken expanded investigation of the Penobscot River, assaying sediment in the channel of the river and in representative areas of the Lower Penobscot River downstream from the plant, and has provided a summary report to the EPA and the MDEP in January 2001. (Id. at 5.) In its work to set the PMPSs for the site, the river at the site, and the Lower Penobscot River, the EPA and the MDEP have used this and the other information gathered to date. (Id.)

Mallinckrodt states in its motion that though my order on the motion to dismiss is the "law of the case" (Id. at 9), with which it "respectfully disagrees" (Id. at 9 n.5), "recent events have now made clear [that] a plan including downriver areas is envisioned by the agencies" (Id at 10). "In fact," it continues, "in the near future the agencies are preparing to finalize a plan that will govern remedial activities not only at the Orrington facility but also in the Penobscot River adjacent to the Plant. In addition, it will provide a format and a structure for studying and addressing elevated levels of mercury in the Lower Penobscot River, if any such elevated levels are measured." (Id. at 10.) Mallinckrodt claims that this new initiative on the part of the EPA and MDEP vis-à-vis the Lower Penobscot River means that the potential for inconsistent outcomes between

the recent and on-going administrative activities and any order resulting from this lawsuit is now "overwhelming." (Id.)

Plaintiffs counter that this new bootstrapped involvement of the EPA and MDEP with the lower river is an effort on Mallinckrodt's part to forestall this litigation and will, at best, address only the tip of the iceberg with respect to the concerns the plaintiffs have with this area of the river. They assert that the basis of the new activity by the agencies vis-à-vis the downriver area is a self-serving rushed study that was triggered by the April 2000 filing of this suit and was initiated by Mallinckrodt without agency comment on the proposed work plan. (Pls.' Opp'n to Dispositive Mots. at 15, citing Def. Ex. 13; Chaffee Tr. 134-37, 144-46; Zeeman Tr. 123-24; Grant Tr. at 116-17, 139-40.) Rather than seeing an impending conflict the plaintiffs contend that "it is now clear that the agencies have no intention of addressing downriver mercury contamination in any meaningful way, and that there will be no downriver remedial plan with which this citizen suit could possibly interfere." (Pls.' Opp'n to Dispositive Mots. at 15.)

A. Conflict

The question of what a "conflict" is for purposes of the application of the primary jurisdiction doctrine remains highly disputed between the parties. Mallinckrodt argues conflict looms on three fronts: the amount and temporal scope of the investigation that Mallinckrodt must undertake; the setting of appropriate remedial standards; and the determination of the appropriate remedial activities. According to Mallinckrodt, plaintiffs seeks an injunction that "(1) will require a study that is far more comprehensive than the information that EPA and MDEP have concluded is necessary for making cleanup decisions for the Penobscot River; and (2) will likely result in cleanup goals and

actions that conflict, undermine, or are otherwise incompatible with the agencies likely clean-up order." (Id. at 13-14.) The plaintiffs retort that Mallinckrodt's assertion of conflict is specious and that this is a situation in which the agencies have determined not to order further activity, a situation in which citizens claim there is an endangerment nevertheless, and, thus, this is "precisely the situation contemplated by RCRA" as permitting a citizen suit. (Pls.' Opp'n to Dispositive Mots. at 21.)

1. Amount and Timing of Information Gathering

First Mallinckrodt complains that the plaintiffs "seek a staggering amount of information relating to the River and the Bay" (Mot. for Order on 11th Defense at 10), more akin to "an academic research project than a site investigation" (id. at 11). It states that the EPA and the MDEP are satisfied that they have enough information already "to make educated decisions about appropriate and protective corrective measures for the site and the River, and that they need no additional data, (id . at 5-6, 11, citing Ashley Aff. ¶ 4, Ex. 3. Waterman Dep. at 8, 11, 264-65; Lander Dep. at 5, 9, 156-57, Ex. 5; Zeeman Dep. at 194-97, Ex. 6), even data from down river (Id. at 6, citing Waterman Dep. at 264-65). Mallinckrodt argues that the plaintiffs' demand for additional study is "directly inconsistent with the agencies' decisions and current directions" and that Mallinkrodt "should not be placed in a situation where it must respond to competing and divergent masters." (Id.) In a footnote Mallinckrodt also suggests that abstention on primary jurisdiction grounds is warranted because the need to collect further data per the plaintiff's demands, would "cause further delay in the administrative process, spatially interfere with the activities Mallinckrodt will be undertaking at the direction of the

agencies, and ultimately delay implementation of remedial efforts directed by the agencies." (Id. at 11 n.6.)

Plaintiffs counter that the rushed study on the downriver site relied upon by Mallinckrodt is not sufficient to assess the extent and effects of mercury contamination. (Pls.' Opp'n to Dispositive Mots. at 12, citing Livingston Supp. Expert Review, Bernard Ex. B, at 2-20.) In the plaintiffs' view the data that Mallinckrodt and the agencies are currently working with, though inadequate, reveals "significant adverse effects requiring scientific pursuit." (Id. at 12-13.) They stress that EPA and MDEP do not intend to require further investigation downriver prior to moving ahead with its RCRA corrective action. (Id. at 13, 16, citing Grant Tr. at 127; Waterman Tr. at 264; Def. Primary Jur. Mem. at 6.) They argue that the fact that the EPA and MDEP have reached a resolution involving the lower river means their efforts to get a court order to conduct further study does not risk conflict.

2. Standards

Mallinckrodt complains that there will be further conflict as the relief the plaintiffs seek will likely involve establishment of Court supported clean-up standards for the River. (Id. at 12.) Mallinckrodt and the agencies have "an agreement in principle on the preliminary media protection standards that will address the sediments in the Lower Penobscot River" and are "poised" to make PMPS determinations for the Penobscot River. (Id. at 5-7, 12, citing Waterman Dep. at 8,11, 264-65, 273-76; Lander Dep. at 200-01.) Unlike the gap in Mallinckrodt's primary jurisdiction case in its motion to dismiss, there is "a 'downriver remedial plan [] underway or envisioned.'" (Def.'s Reply at 8.) In addition to requirements for the Orrington plant site and the part of the river

immediately offshore of the plant, these agreed-upon standards will, Mallinckrodt "anticipates," provide that Mallinckrodt must investigate further any areas with sediments containing mercury concentrations greater than 10.7 parts per million (ppm). (Id. at 7, 12 –13.) EPA and MDEP personnel believe that the tentative standards for sediment in the area of the river near the plant will fully protect the "environment in the river" (Id. at 7, citing Zeeman Dep at 214, Ex. g), presumably also the lower river. It follows, Mallinckrodt would have the court believe, that "the only way that Plaintiffs' request would not conflict with the agencies activities is if, at the end of the process, Plaintiffs were to advocate clean-up standards for the River identical to those advanced by the agencies. As a result, unless the Court were to merely ratify the agencies' decisions with respect to the PMPSs and performance standards verbatim, it is nearly impossible that an order would not be inconsistent with the administrative agencies' decisions. Such a duplicative effort would be a waste of Mallinckrodt's and this Court's time." (Id. at 13.)

Plaintiffs counter that the 10.7 ppm "hot spot" standard for downriver remediation anticipated by Mallinckrodt and the agencies is a mirage because no hot spots at that level have been detected downriver. (Pls.' Opp'n to Dispositive Mots. at 13, citing Draft 6/25/01 PMPS, Livingston Decl. ¶ 12; Waterman Tr. at 265.) This level of ppm for the lower river is unprecedented and it is unanticipated that they will occur. (Id. at 16, 20 citing Livingston Decl. ¶ 12; Waterman Tr. at 265.) It is "meaningless" with respect to the lower river. (Id. at 16.) The plaintiffs do not see a conflict with regard to their efforts to get a meaningful standard set for downriver because they are simply seeking an order that addresses what is an unaddressed problem.

3. Remedial Activities

Mallinckrodt foresees the same inevitable conflict with respect to any court ordered remedial activities that are not "identical" to those established by the agencies. (Id.) Here its argument is terse: if the standards differ in any way, so too must the remedial activities required of Mallinckrodt. (Id.) With regard to its factual support for this proposition it states: "Mallinckrodt further anticipates that it will be required to address further investigation of any measured mercury concentrations in downriver sediments equal to or greater than 10.7 ppm." (Id. at 7, citing Asley Aff. ¶ 12.) It asserts that the agencies "may" require it to address downriver areas that exceed the 10.7 ppm. (Def.'s Reply at 8, citing Waterman Dep. at 275, Reply, Ex. 2.) It also notes that it has an obligation stemming from the PMPS with respect to containment work at the Orrington plant site that will minimize the mercury reaching the river (id. at 7 n.4), impacting the remediation needs of the lower river.

The plaintiffs view the status of the EPA and MDEP process as it effects the lower river remediation in a different light. Since this agreement or pending agency order does not anticipate further investigation downriver -- the 10.7 ppm standard set to trigger remediation is so high -- there would be no chance of remediation in the lower river if the agency standards are the lone marker. (Pls.' Opp'n to Dispositive Mots. at 14, 16, citing Def.'s Primary Juris. Mem. at 6,7.) As with their argument concerning study and standards, plaintiffs urge that for purposes of the primary jurisdiction doctrine "an order requiring Mallinckrodt to do something would not be in conflict with a plan calling for it to do nothing." (Id. at 21.)

B. Conclusions Regarding Primary Jurisdiction

I conclude that the new undisputed facts alleged by Mallinckrodt since the motion to dismiss do not transform this into "a particularly conducive fact pattern" so as to warrant application of the primary jurisdiction doctrine at this stage to this RCRA case. I acknowledge that Mallinckrodt has advanced more facts to support a finding that the EPA and MDEP "envision" a remedial plan for the lower river. However, as the plaintiffs point out, there is evidence that this is a plan that "envisions" no remediation for this area.

Both sides are painting this primary jurisdiction inquiry in broad strokes of black and white. Because the EPA and MDEP have touched-upon the lower river, Mallinckrodt contends, and the "downriver issues are within the scope of the corrective action activities under the Consent Decree, and the agencies are making decisions on these issues," the conflict between the regulatory process and this citizen suit is a fait accompli. (Def.'s Reply at 8.) "Even if one assumes that ultimately the agencies will require no corrective measures in the downriver areas (either because there is no significant risk or because the cleanup options are infeasible or more risky)," states Mallinckrodt, "this is still a decision of the agencies under the corrective action process. The relief sought by the Plaintiffs in this case would undoubtedly conflict with such a decision." (Id. at 8-9.) It contends that "[a] decision by the agencies that no action needs to be taken would be just as much – if not more – at odds" with what the plaintiffs seek. (Id. at 9.)

With regards their efforts to dodge an unfavorable primary jurisdiction determination at this juncture the plaintiffs also try to portray the answer as clear-cut.

They want the court to believe that the EPA and the MDEP have spoken their last words with respect to the lower river, foreclosing any further agency-driven investigation, standards, or remediation.

There are shades of gray and in this inquiry it is with an eye to these gradations that I conclude, once again, that Mallinckrodt is not entitled to a favorable disposition on the grounds of primary jurisdiction. Though in Mallinckrodt's mind's eye, the potential necessity to undertake additional investigation, be subject to stricter standards, and to undertake greater remediation than required by the EPA and MDEP "undermines, or are otherwise incompatible with the agencies' likely clean-up order" and amounts to a "conflict" sufficient to invoke the primary jurisdiction doctrine (Id. at 14), I disagree. The issue is not how much more time or how many more resources Mallinckrodt may or may not be required to expend as a result of an injunctive order by this court. Extra burden is not what the doctrine is meant to circumvent; additional obligation is not incompatible with nor does it undermine the agency-driven process. If this suit were proceeding without the layer of the ongoing EPA and MDEP regulatory process, certainly Mallinckrodt would not be able to duck the legal action by complaining about the potential for additional burden.

I realize that if EPA and MDEP conclude down the road that cleanup options for the lower river are infeasible or risky this would raise a concern that a contrary court ordered remediation propelled by this suit would conflict. However, I agree with the plaintiffs that on the state of the current record and the undisputed indications that there will be no need for remediation by Mallinckrodt based on the proposed standards as now framed, this conflict is not so inherent and tangible so as to justify short circuiting this

congressionally authorized citizen suit on primary jurisdiction grounds. As the plaintiffs point out, when and if this Court and the parties arrive at a remedy phase, the conflict concern can be revisited.[2]

Conclusion

For these reasons I conclude that Mallinckrodt is not entitled to favorable judgment on these three affirmative defenses at this juncture. To the extent that these motions seek a summary disposition, I recommend that the court **DENY** Mallinckrodt this relief.

NOTICE

> A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.
>
> Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

Dated December 14, 2001

_____
Margaret J. Kravchuk
United States Magistrate Judge

[2] There is a contradiction in Mallinckrodt's position as to this motion and the motion on laches. In its motion for summary judgment based on laches, discussed in a separate order, it argues that the plaintiffs waited too long to bring this suit and that it ought to have been brought upon their discovery of the mercury problem, early on in the EPA and MDEP process before that regulatory work got too far along. If Mallinckrodt's representations about the commencement of EPA and MDEP involvement in the down river concerns are accurate, the parties are in a sense at the beginning of this process on the previously uninvolved down river site. Yet, rather than arguing that now is the time to pursue their court remedy with respect to the downriver site, they argue that the plaintiffs should be brought up short on primary jurisdiction grounds to allow the regulatory process to run its course.

BANGOR COMPLX

U.S. District Court

District of Maine (Bangor)

CIVIL DOCKET FOR CASE #: 00-CV-69

MAINE PEOPLE'S ALLIA, et al v. HOLTRACHEM MFG CO, et al Filed: 04/10/00

Assigned to: JUDGE GENE CARTER

Demand: $0,000 Nature of Suit: 893

Lead Docket: None Jurisdiction: Federal Question

Dkt# in other court: None

Cause: 42:6901 Resource & Recovery Act

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